IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELISSA FERRICK, et al., Plaintiff, vs. SPOTIFY USA INC., et al., Defendants.	No. 1:16-cv-08412 (AJN)

REPLY IN SUPPORT OF CLASS COUNSEL'S
MOTION FOR ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES

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Objectors' Counsel are not novice objectors; they are serial, repeat objectors. They have a long and sordid history of making frivolous objections to class action settlements as part of a tactic to be paid off to drop their objections for their own personal gain and not for the benefit of the classes they profess to be protecting. They falsely claim to be championing the interests of the classes in objecting to settlements and in that regard take on the role of fiduciaries to the classes. But by virtue of their appearances as objectors in dozens of class actions, they must be judged as being fully knowledgeable about the need to comply with the orders of a court to be able to object to a class action settlement.

An article written about *Visa Check* described Silverman's counsel, Mr. Pentz, as a "holdup artist." *See* Pachman Decl., Ex. 1. Notably, Mr. Pentz did not comply with the requirements of the Settlement requiring objectors and their counsel to list all cases in which they had objected in the past five years. Dkt. 204 at 4. Counsel for Diable and Dearing, George W. Cochran, has also been identified as a "serial objector," and has made a habit of filing late objections, which other courts have stricken. *See, e.g.,* Pachman Decl., Exs. 2, 3.

Here, although the notice to the Class provided that Class Counsel could seek up to 33% of the past damages fund plus a separate $5 million payment from Spotify for the future monetary and non-monetary relief that the Settlement achieved, which would have resulted in a payment of $19.48 million, Class Counsel sought a fee award of only $15.48 million. This award is only 14% of the gross settlement value of $112.55 million. Using a more conservative methodology, this award would be 25% of the past damages fund plus the $5 million payment from Spotify to value future monetary and non-monetary relief. Nothing in any Objectors' papers demonstrates that the fee requested by Class Counsel is unreasonable.

The only objectors who have filed objections related to attorneys' fees since Class

Counsel filed their original motion are Tracy Silverman ("Silverman"), Kristin Diable and Tamara Dearing ("Diable and Dearing") (collectively, "Objectors"). Diable and Dearing failed to timely object to the Settlement. The deadline for objections was September 12, 2017. Regardless, Objectors ignore the ample Second Circuit authority that requires consideration of the *entire* gross settlement benefit in calculating the appropriate percentage recovery. They also make a number of arguments as to the reasonableness of Class Counsel's lodestar by making arguments that do not even apply to the case at hand – for example, suggesting that if contract attorneys' hourly rates are the same as partners' hourly rates, that would be objectionable. There were no contract attorneys involved in litigating this case. *See* Declaration of Steven G. Sklaver, Dkt. 284 ¶¶ 20, 23. These Objectors – all of whom are represented by serial objector counsel – are regurgitating arguments made in prior class cases that have no bearing here. The Court should also disregard Objectors' remaining unsupported, conclusory arguments pertaining to the amount of risk involved in taking on this case, the calculation of the benefit of the future monetary relief, and the incentive payments due to Class Representatives.

I. Class Counsel's Requested Fee Is Reasonable

A. Future Settlement Benefits Should Be Valued by the Court

Objectors' claims are based on the false premise that $63.1 million in future monetary and non-monetary relief should be ignored by the Court. But courts in the Second Circuit customarily award attorneys' fees as a percentage of the gross settlement benefit. *See* Dkt. 290 at 5-8. *See also Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *10 (S.D.N.Y. Sept. 9, 2015) ("The overall value of the settlement comprises monetary as well as non-monetary relief."); *Sykes v. Harris*, No. 09 CIV. 8486 (DC), 2016 WL 3030156, at *17 (S.D.N.Y. May 24, 2016) ("Under either calculation of the full value of the Settlement, Class Counsel's request is reasonable.").

The calculation of the gross settlement benefit is particularly appropriate here, where the future monetary relief, a royalty payment program, is a direct financial benefit for the Class. Accordingly, Class Counsel's use of the gross settlement fund in its percentage calculation, which considers the past damages fund ($43.45 million), future monetary relief ($63.1 million), separate payment for future monetary and non-monetary relief ($5 million), and notice and administration costs (over $1 million), and the benefits of non-monetary relief in the form of creation of a Mechanical Licensing Committee, collaboration with industry participants, audit rights, and receipt of catalog information, Dkt. 176-3 ¶¶ 4-8; is the preferred approach. Class Counsel's fee request is only 14% of the gross settlement. This is more than 50% *below* the fees typically awarded in complex class actions. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118 VM, 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("[T]he fee request of 33% of the Gross Settlement Fund is well within the percentage range that courts within the Second Circuit have awarded in other complex litigations.").

Diable and Dearing raise a number of undeveloped arguments as to the valuation of the gross settlement. First, they claim that "speculative" benefits should not be included in the calculation. But the future royalty payment program is anything but speculative. The program will go into effect no later than 60 days after the Claim Date and will make payments to Settlement Class Members on a quarterly basis. Dkt. 176-3 at ¶ 4.3(a). Second, they suggest that the $5 million attorneys' fee payment made by Spotify for future relief obtained demonstrates a lack of value. But that portion of the fee award is separately paid by Spotify, on top of and in addition to the fund for past damages. Third, they criticize the expert analysis of Joao dos Santos, claiming that Mr. dos Santos relies on "innumerable assumptions" though they only dispute one such assumption. They claim Mr. dos Santos fails to account for the "historic

10% participation rate reported on class action claims." Dkt. 312 at 10. But this Circuit has ruled that "[a]n allocation of fees by percentage should be awarded on the basis of total funds made available ***whether claimed or not.***" *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 437 (2d Cir. 2007) (emphasis added).[1] They also ignore that none of the funds will revert to Spotify, and that all of the funds will be distributed pro rata among Class Members. Fourth, they argue that Class Counsel's fees should be deferred until the royalty payment program is completed – which is no earlier than five years after the Claim Payment Date (Dkt. 176-3, ¶ 4.3(a)). But courts in this District support prompt payment of class counsel following resolution of a case, acknowledging that lodestar multipliers are approved in part to compensate class counsel for the long delay in obtaining a fee. *See Fleisher*, 2015 WL 10847814, at *18 ("This lodestar is calculated at current hourly rates, which has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation."); *Friedlander v. Barnes*, 1986 WL 5517, at *2 (S.D.N.Y. May 8, 1986) (approving payment of attorneys' fees). Thus, it is fair and reasonable for such funds to be paid upon approval by the Court.

Additionally, Diable and Dearing argue that the percentage of the fee award must be inversely related to the settlement size. Dkt. 312 at 4. But this position misstates the law. Other courts have acknowledged that this "sliding scale approach" is inappropriate where class counsel are seeking a fee consistent with the norms in this Circuit. *See, e.g., Siler v. Landry's Seafood*

[1] *See also Velez v. Novartis Pharmaceuticals Corp.*, No. 04-09194, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (quoting *Masters*, 473 F.3d at 437) ("[T]his Circuit has ruled that '[a]n allocation of fees by percentage should therefore be awarded on the basis of total funds made available whether claimed or not.' "); *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 443 (S.D.N.Y. 2004) (noting that attorneys' fees equivalent to one-third of common fund of $18.4 million was approved notwithstanding that only $5.6 million of the $18.4 was claimed by class members with the remaining $11.8 million unclaimed and reverting to the defendants); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 815 (E.D. Wis. 2009) (awarding $625,000 of $2.1 million fund amount despite only $500,000 in claims).

House - N. Carolina, Inc., 2014 WL 2945796, at *11 (S.D.N.Y. June 30, 2014) (use of "sliding scale" approach not necessary where attorney sought 25% of the common fund).[2]

B. Class Counsel's Lodestar Is Reasonable

Class Counsel litigated this case efficiently to achieve a tremendous result for the Class, which is reflected in the lodestar. Diable and Dearing make arguments based on caselaw that is inapplicable to the instant case. For example, they argue that Class Counsel's lodestar is unreasonable because of time spent pursuing discovery after settlement negotiations began, citing *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 391 (S.D.N.Y. 2013). But unlike in *In re Citigroup*, where attorneys expended thousands of hours on document review after settlement negotiations began, Class Counsel worked with experts to analyze data exchanged in conjunction with the mediation process. Further, they argue Class Counsel's lodestar is unreasonable if Class Counsel charged partner rates for contract attorneys; but there were no contract attorneys involved in this litigation. They also criticize "inefficiencies among law firms" with no explanation. Similarly, they claim – again without explanation – that there were too many partner hours compared to associate hours. But given that the parties were engaged in settlement discussions for nearly a year, to the extent any "disparity" exists, it is because settlement negotiations are a task where partner involvement is essential.

They also argue that Class Counsel should not be compensated for time spent vying for lead counsel. But this position is contrary to law. The case cited by Diable and Dearing was only referring to *non*-lead counsel's efforts to obtain a lead counsel position. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 390 (S.D.N.Y. 2013). And *In re Citigroup* specifically distinguished lead counsel's efforts to obtain a lead counsel position, noting that those efforts

[2] *See also Willix v. Heathfirst,* No. 07 Civ. 1143 (ENV)(RER), 2011 WL 754862, at *6–7 (E.D.N.Y. Feb. 18, 2011) (determining it did not need to use the "sliding scale" approach to prevent a windfall because the requested amount of 33% was "consistent with the norms of class litigation in this circuit.").

were compensable. *Id.*

II. Class Counsel Assumed Great Risk in Conjunction with Litigating this Case

Tracy Silverman filed an objection to Class Counsel's request for attorneys' fees, claiming that class counsel should only get a $10 million fee. Silverman objected that the fee was too high on the grounds that this case was "low risk" and of relatively "short duration." Her arguments are classic Monday morning quarterbacking and also conclusory – she provides no explanation as to why the case was of low risk (after all, if it really were, why she didn't file it). As explained in Class Counsel's and Spotify's Motions for Final Approval, this case involved a great deal of risk in establishing liability, damages, and getting a class certified, and was litigated for almost two years from filing to the final approval hearing.

Similarly, Silverman's conclusion that a lower multiplier is justified because the case was of relatively "short duration" is contradicted by the caselaw – indeed, where a case settles in the early stages of litigation, this justifies a *higher* multiplier. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), cited by Silverman, supports this principle. *Visa Check* settled after seven years of litigation, on the eve of trial, after the class has been certified. In deciding upon a fee, the court specifically distinguished *In re Buspirone Antitrust Litig.,* No. 01–MD–1410 (S.D.N.Y. Apr. 11, 2003), where a SDNY court awarded an 8.46 multiplier: "In an oral opinion, the court explained that it was allowing such a high hourly rate because the case ha[d] settled before a substantial amount of additional work ha[d] been done which would have to be done if the case went forward to complete discovery [and] ... [d]uring all of that period the number of hours spent would have significantly increased. So the Lodestar would have gone up and the multiplier would have gone down." *Visa Check*, 297 F. Supp. 2d at 525, n.29.

While Class Counsel's lodestar in this case would have gone up significantly if it had

continued to litigate this action (as it did in *Visa Check*), Class Counsel was able to achieve an incredible result at the early stages of litigation. Indeed, the Second Circuit has encouraged the percentage method for awarding attorneys' fees to encourage this behavior. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("In contrast, the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits."); *Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) (applying percentage method and awarding 33.33% of settlement fund for fees where the parties were able to settle relatively early and before any depositions occurred," as the method "avoids the lodestar method's potential to 'create a disincentive to early settlement'" (quoting *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 418 (2d Cir. 2010)); *In re Colgate Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) ("On the other hand, the lodestar method has fallen out of favor particularly because it encourages bill-padding and discourages early settlements.").

While the lodestar multiplier of 7.82 would be reasonable in light of the procedural posture of the case and result obtained by Class Counsel, the lodestar multiplier is even more reasonable when the past damages fund is considered distinct from the $5 million in fees Spotify has agreed to separately pay for the prospective relief for the Class obtained. Other courts have followed this approach. *See, e.g., Faught v. Am. Home Shield Corp.*, 66 F.3d ,1233, 1243-44 (11th Cir. 2011) (analyzing a $1.5 million separate lump sum payment separately from the net settlement fund in calculating attorneys' fees). Where the past damages fund is analyzed separately from additional benefits obtained by Class Counsel, the lodestar multiplier is only 5.34.[3]

[3] ($15.86 million - $5 million = $10.86 million) / $2.03 million = 5.34.

Diable and Dearing also suggest that Class Counsel's fee is inappropriate in light of the risk Class Counsel faced. But their arguments are not based in fact. First, they claim Class Counsel's participation in this lawsuit came on the heels of settlement negotiations with the NMPA, but the NMPA settlement happened in March 2016 — *after* this lawsuit was filed. *See* http://www.mndigital.com/blog/spotify-nmpa-settlement-metadata-streaming-focuses-sxsw. Further, Diable and Dearing's contention that Class Counsel did not investigate this case is false, as detailed elsewhere. *See* Dkt. 53 at 3-4; Dkt. 316 at 2, 7. Diable and Dearing's suggestion that Michelman & Robinson are entitled to any fees is also contrary to law, as detailed in Class Counsel's Opposition. *See generally* Dkt. 316.

III. Class Counsel Should Not Be Penalized for Efficiently Litigating This Case

Again, with no explanation, Diable and Dearing contend that settlement was "on the mind" from the beginning of this case because of a paucity of time and labor spent on dispositive issues. But Class Counsel worked diligently on dispositive issues, as detailed in the Final Approval Motion: Class Counsel expended significant resources litigating this case, mediating the case, and working with experts to review documents and data provided by Spotify in conjunction with mediation. *See* Dkt. 283 at 1, 3-4. In any event, Class Counsel should not be penalized for obtaining a superb result for the Class relatively early in the case.

Diable and Dearing make the wholly unsupported claim that the bulk of Class Counsel's hours were spent on the motion for appointment of lead counsel. But this is inaccurate. While there are a number of docket entries pertaining to the motion for appointment of lead counsel, the bulk of Class Counsel's time was spent investigating the case, litigating motions to dismiss and motions to strike, mediating the case over the course of the past year (including significant time obtaining and analyzing discovery from Spotify, in conjunction with experts), negotiating and finalizing a detailed settlement agreement and developing a robust notice and claims facilitation

program, and moving for approval of settlement. Similarly, to the extent Diable and Dearing attempt to argue that this Settlement is inadequate by comparing this case to the *Flo & Eddie* case, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2:13-cv-05693-PSG-GJS, such a comparison is misguided because they are comparing apple and oranges. *Flo & Eddie* settled on the eve of trial, such that class counsel's comparatively larger lodestar was appropriate. As detailed in Part II above, it would be inappropriate if Class Counsel here had a substantially larger lodestar given the procedural posture of the case. Indeed, it would only suggest inefficiency. The lodestar here is appropriate for the stage of the litigation and is consistent with Class Counsel's reasonable request for 14% of the gross settlement fund.

IV. The Incentive Awards for Class Representatives Are Appropriate

Diable and Dearing argue that the incentive awards for class representatives are excessive. They claim their objection is based on the minimal personal risk, time commitment, and specialized knowledge exhibited by class representatives. These contentions are inaccurate, and the risk taken on by class representatives, time expended, and specialized knowledge has previously been explained in detail. Dkt. 290 at 21-23. *See also* Dkt. 94-1 ¶ 13. Diable and Dearing fail to provide any authority for the proposition that $25,000 is excessive. The cases cited in Class Counsel's Motion for Attorneys' Fees and Expenses demonstrate the reasonableness of the incentive awards sought. Dkt. 290 at 21-23.

Diable and Dearing also attempt to argue that $25,000 for incentive payments is inappropriate because Settlement Class Members will only receive four dollars per composition. But this argument is baseless. Because the Settlement Agreement provides for *pro rata* distribution, it is impossible to know how much each Settlement Class Member will receive

before the claims administration process begins.[4] Furthermore, each class member will receive a minimum payment, regardless of number of streams on Spotify's service.

V. Conclusion

Class Counsel's fee request of $15.48 million is reasonable in light of the exceptional $112.55 million result obtained for the Class. The 14% percentage of the total gross recovery sought by Class Counsel is appropriate and in line with the guidelines set forth by courts in this Circuit. Objectors' various arguments, propounded by their serial objector attorneys, as to why the fee requested from Class Counsel is unreasonable are based on a misunderstanding of the relevant law — Diable and Dearing's argument is based on the idea that the remarkable future monetary benefits obtained for the class (from the future royalty payment program) should not be valued. But the Second Circuit plainly values these benefits for the Settlement Class, particularly where, as here, the future royalty payment program confers substantial financial benefits.

In addition to the failure to appropriately value the benefit obtained by Class Counsel, the remainder of Objectors' arguments appear to be based on non-binding cases that are not germane to the issues at hand in this Settlement. As such, these arguments should have no bearing on the Court's determination of Class Counsel's Motion for Attorneys' Fees and Expenses.

Dated: November 24, 2017

Respectfully submitted,

By: */s/ Steven G. Sklaver*
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[4] Diable and Dearing also request Class Counsel to disclose their fee sharing arrangement. Class Counsel are splitting fees 50/50 between their two firms.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 24, 2017**,** all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's SDNY Procedures for Electronic Filing.

/s/ Steven G. Sklaver
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